

Your Condo Can Incur Liability By Just Filling Out a Routine Form

May 2022

After the [Champlain Towers collapse](#), Fannie Mae updated its [Form 1076](#) asking condos to provide more information about their property when units are being sold using Fannie Mae related financing. <https://singlefamily.fanniemae.com/media/15656/display>

But the form essentially asks condo board members or managers to certify that the property is structurally sound. Some of our experts are part of industry efforts to convince Fannie Mae to revamp the form again to remove the onerous questions.

Until they're successful, you'll still have to wrestle with how to handle the questions on the form. Here, we answer an [HOAleader.com reader's question](#): "Has anyone seen any guidance/instructions regarding completion of Form 1076? Some of the questions are vague, and our HOA isn't quite sure how to interpret them."

A Fine Mess Fannie Has Gotten Condos Into

It's the addendum starting on page 6 of the 1076 form that's giving our experts heartburn. The questions probe the structural integrity of the condo's property. One example is question 3, which asks if a condo corporation is aware of deficiencies in the condo's [safety](#), soundness, structural integrity, or habitability.

"In our area, concerns were initiated by FirstService Residential, a management company, which first picked this issue up and apparently said, 'Holy crap!'" reports [Phaedra J. Howard](#), a partner specializing in community association law at Hellmuth & Johnson PLLC in Edina, Minn. "Normally, [management companies](#) fill out these forms for condos. FirstService essentially said to its clients in our area, 'We as a management company aren't going to be responsible for the answers to these questions. We're just not.'

"They suggested their condo association clients work with their attorney of choice, and many of those condos came to us for help in putting together answers to the questions," she adds. "The questions sort of ask the condo to certify that the building is structurally sound. Also, questions 6 and 7 ask whether there's [funding in place for deferred maintenance](#). That assumes the condo has deferred maintenance. The questionnaire also asks whether the condo expects there will be future code violations."

Universally, the experts we've spoken with say their condo clients are confused and unsure about how to handle this new form, and they're reaching out to our experts for guidance. Marshal Granor, CCAL, managing partner at Granor & Granor PC in Horsham, Pa., who's not only a community association lawyer but the former owner of a community association management company, says his clients have sought advice, many after learning about the issue from their manager.

Also getting calls and emails is Jasmine F. Hale, CCAL, a partner at Berding & Weil based in Walnut Creek, Calif., who advises condos and HOAs throughout California. "I'm absolutely receiving questions from client boards asking, 'How are we supposed to response to this?'" she states.

Advice Varies But is Consistent

Each of our experts has a slightly different approach in advising clients. But the advice is based on the general premise that condo board members aren't experts in their building's structural issues and therefore shouldn't make definitive statements or representations in answering Fannie Mae's new questions.

"We're not advising anyone to hold off on answering," reports Howard. "Personally, I'm concerned about fair housing issues. I think not answering pretty much guarantees the borrower's loan will be denied, and a large percentage of Fannie and Freddie borrowers are minorities.

"I worry there could be a claim that condos aren't answering the questions in an effort to prevent certain people from buying into the property," she explains. "That's not the reason they're not answering, but I don't think we even want to go there."

So what are Howard, Granor, and others suggesting? Here's a rundown of the various approaches:

- **Provide what you can and add disclaimers**—"Some of these condos are clients that are new to us," explains Howard. "So we're essentially saying, 'OK, board, we don't know what inspections you're had, and this is our first representation of your association. We don't know you from Adam or the status of your property. You put together the answers to the best of your ability, and then we'll talk about the answers and make adjustments as necessary.'
- "We're suggesting condos answer many of these questions along the lines of, 'We haven't received any information that there are unsafe or unsound conditions, but the lender has to do their own due diligence,'" she adds. "We're also suggesting they go back to any inspections they've had and their reserve study and include those. For instance, if they had the parking garage inspected, we'll disclose that inspection as well, but we'll put in all these disclaimers about the disclosures."
- **Say the truth: We can't meaningfully respond**—"I've been sort of the grim reaper, if you will, telling clients there are real risks if they respond to the Fannie or Freddie addendum," says Hale. "There's the standard questionnaire, and I'm advising clients that everyone needs to continue answering that."

"It's the addendum Fannie and Freddie adopted—there's no good way to answer the questions without liability," she says. "And in every case I've analyzed so far, it appears to me that condos have no legal duty to provide a response. I'm suggesting clients respond by saying that the association is unable to provide a substantive response and that lenders are able to do their own inspections for underwriting."

Hale says a recent California case, [*Atain Specialty Insurance Co. v. Lake Lindero HOA, Lordon Enterprises, Inc. d/b/a/ Lordon Management*](#), which HOAleader.com [just reported on](#), is helpful in understanding the risks condos face. "It has zero to do with Fannie and Freddie questions but is 100 percent applicable," she explains. "In that case, the association knew they had a potential [insurance claim](#) because they had a grudge match with the management company. And they didn't disclose that potential claim to the insurer when applying for insurance."

"That case says, 'Hey, this association didn't honestly and accurately respond to a form, so it's OK for the carrier to deny the coverage,'" states Hale. "That same logic is absolutely analogous to associations that are underreserved or have deferred maintenance. There's a difference between saying 'Everything's fine' and 'We're not answering the question.' That case reinforced my recommendation that boards tread very carefully."

- **We don't know what we don't know**—"I'm telling my clients that I don't think they have the expertise to answer the new questions about the safety and soundness of their buildings," says Granor. "Many of my clients are townhouse associations in which the association isn't responsible for the soundness of the building."

"I don't have any high-rise condo clients, but I do have condo clients," he adds. "They've done their reserve studies, and they did a [transition study](#) when they took over responsibility from the developer. But nobody's going to go out on a limb—not the manager or the board—to promise that the building doesn't have some issues somewhere."

"We want to help owners in condo communities sell their houses and don't want a stigma on the associations that the people within the community aren't at all helpful," notes Granor. "So I prefer saying something that sends this message: 'We're answering all these other questions for you. On the other questions, as lay people, we're not aware of anything today, but we can't attest to something we don't know.'"

- **Don't guess**—"With all of our condos, we're advising our clients that there's not an obligation in Arizona to ensure funding for the sale of units, and condos don't have a mandatory obligation to fill this form out," explains Josh Bolen, CCAL, co-managing partner at Carpenter, Hazlewood, Delgado & Bolen in Phoenix, whose firm represents about 4,500 community associations in Arizona.

"We're telling them that if they don't have this information, don't guess," he adds. "And err on the side of not filling the questions out. If someone wants that information and you've had inspections lately or a reserve study, you can give them that information through a records request and let them make their own conclusions. The questions seem to require the association to put itself in an expert's shoes and come to conclusions, and we'll never advise our clients to do that."

Stay Tuned; Change is Constant

Industry insiders are working to fix the challenges raised by this new form, but there's been no change yet. "I do know there's a national push to get this fixed," says Bolen. "Of course it's bad for the marketplace if all kinds of funding aren't available. But condo associations can't take on this risk. I hope Fannie Mae is going to address it."

In the meantime, condos seem to be chugging along without many hiccups. "In my opinion, these questions appear to be vague," says Hale. "I've had clients really wrestle with this, asking, 'Are we going to risk owners not being able to sell or resell?'"

"I haven't heard from clients who've adopted policy of respectfully not responding that, 'OMG! it's Armageddon! Property values have plummeted! Nobody is able to sell or refinance!'" Hale reports. "I'm gathering that the industry is moving along."